IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-910

OCCIDENTAL OF UMM AL QAYWAYN, INC.,

Petitioner,

—v.—

CITIES SERVICE OIL CO., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOUIS NIZER
GERALD MEYER
NEIL A. POLLIO
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
40 West 57th Street
New York, New York
10019

THOMAS M. BERGSTEDT
SCOFIELD, BERGSTEDT & GERARD
1114 Ryan Street
P. O. Box 1136
Lake Charles, Louisiana
70601

J. BOND SMITH, JR.
BIGHAM, ENGLAR, JONES & HOUSTON
14 Wall Street
New York, New York
10005

DAVID STONE
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana
70130

HENRY J. READ
MONTGOMERY, BARNETT, BROWN & READ
806 First National Bank of Commerce Building
New Orleans, Louisiana
70130

Attorneys for Occidental of Umm Al Qaywayn, Inc., Petitioner

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Occidental of Umm Al Qaywayn, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, *infra*) is reported at 577 F.2d 1196. The opinion of the district court (App. B, *infra*) is reported at 396 F.Supp. 461 (W.D. La.).

Jurisdiction

The judgment of the court of appeals was entered on August 9, 1978. On October 31, 1978, Justice Powell issued an order granting to the petitioner an extension of time through December 7, 1978 within which to apply for cer-

tiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. In an action between American citizens concerning title to property illegally confiscated abroad and brought into the United States, did the court of appeals err in declining jurisdiction on the ground that the ownership of an island contested between two foreign states involves a political question, when no such issue existed because no matter who owned that island, the confiscated oil before the court was extracted outside of that island's three-mile territorial water limit?
2. Where the Executive Branch of our Government has repeatedly proclaimed a three-mile water limit rule and applied it to the very territories involved in this case, must not the Federal Court follow such rule in deciding the case, instead of declining jurisdiction?
3. Did the court of appeals err in surrendering its judicial function upon the suggestion of the Legal Adviser of the State Department that it should not decide this case?
4. Does not the political question doctrine merely require the courts to follow an executive determination as here, rather than create a judicial vacuum by depriving the courts of jurisdiction?
5. Is not the issue in this case, which the court of appeals has denominated a "political question", indistinguishable from an act of state issue, and therefore within the Hickenlooper mandate that "no court . . . shall decline . . . to make a determination on the merits"?

6. Even if the court of appeals was not bound by the Hickenlooper Amendment, did it err in disregarding the strong Congressional policy embodied in it, which requires judicial determination of the property claims of victims of foreign confiscations?

Statutory Provisions Involved

United States Code, Title 22 §2370(e)(2).

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law . . . or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Treaty Provisions Involved

Convention on the Continental Shelf of April 29, 1958, 15 U.S.T. 471, TIAS 5578; 499 U.N.T.S. 311, effective as of June 10, 1964), article 2, paragraph 1 and article 6, paragraphs 1 and 2.

"Article 2

"1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

"Article 6

"1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

"2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Statement of the Case

This case involves crucial constitutional questions that transcend the hundreds of millions of dollars at stake here. All of the parties are American corporations. The petitioner attached crude oil in the United States. It was extracted from a location in the Persian Gulf included within an oil concession that was validly granted to the petitioner, and later confiscated without payment of compensation, in violation of international law. The respondents have thus far persuaded the courts to refuse jurisdiction of the dispute, thereby preserving an immune "thieves market" in the United States for confiscated property.

The district court declined to try the case and granted summary judgment for the respondents on the ground of the "act of state" doctrine. The court of appeals affirmed on what it called a "slightly different ground"—that the case presents a "political question", and is therefore not a "case or controversy".

A. The Facts

The basic issue in this case is simple, and not "unmanageable" as held by the courts below. Despite the geographic details and the exotic sheikhdoms involved, the case is determined by the three-mile territorial water rule which has been applied by the United States for nearly two centuries.

Umm Al Qaywayn ("Umm") and Sharjah are two of the Trucial Sheikhdoms (now known as the United Arab Emirates), located on the southeastern coast of the Persian Gulf. For over a century until November 30, 1971, the United Kingdom was the protecting power over the Trucial Sheikhdoms, including Umm and Sharjah. By treaty, the United Kingdom was in charge of the international relations and defense of the Sheikhdoms and had jurisdiction over their territories, including their territorial waters. This treaty was recognized by the United States. No oil concession could be granted by any of the Trucial Sheikhdoms without the approval of the British Government.

In 1964, the Rulers of Umm and Sharjah entered an agreement under the auspices of the British Government establishing the seabed border between them. The agreement was based on an admiralty chart delineating the boundary between the continental shelves of Umm and Sharjah, and showing the continental shelf of Umm as extending to the three-mile limit of the territorial waters of the island of Abu Musa. This tiny island is situated about forty miles off the coast of Umm and Sharjah, and had for centuries been under the exclusive sovereignty of Sharjah.

On November 18, 1969, Occidental of Umm Al Qaywayn, Inc. ("Occidental") a California corporation, acquired from the Ruler of Umm a forty-year exclusive oil concession granting Occidental all property rights and ownership to the oil. Said concession covered all offshore waters of Umm and the underlying seabed, as outlined on a map annexed to the concession. (A copy of the map is reproduced as Appendix C to this petition; a copy of the same map with clarifying identifications is annexed as Appendix D.) The boundaries of the concession shown on the map were identical to the boundaries established by agreement between the rulers of Umm and Sharjah five years earlier, in 1964. Specifically, the map showed that Occidental's concession area extended on the northwest to the three-mile limit of the territorial waters of the island of Abu Musa. Great Britain, as the protecting power, ratified the Occidental concession.

Six weeks later, the Ruler of Sharjah granted an oil concession to Buttes Gas & Oil Co. ("Buttes"). The Sharjah-Buttes concession covered an area that was contiguous with, and did not conflict with, the concession recently granted to Occidental. This too was formally approved by Great Britain.

Occidental promptly conducted extensive seismic tests in its concession area, at a cost of more than $4,000,000. These tests indicated the prospect of oil and gas in large quantities at a location clearly outside the three-mile territorial water limit of the island of Abu Musa, in a location wholly within Occidental's concession area.

Buttes learned of Occidental's oil find and launched a campaign to capture Occidental's property. It notified the British Political Agent in the Trucial Sheikhdoms, on March 25, 1970, that it intended to commence drilling *in the precise location of Occidental's oil find.* A few days later, the Ruler of Sharjah claimed for the first time to have issued a decree, allegedly made six months earlier, on September 10, 1969, and concededly "unpublished" at that. This "secret" decree, which by strange coincidence predated Occidental's approved concession, purported to extend the territorial waters of Sharjah and of its islands, including Abu Musa, from three to twelve miles.

The Sharjah decree was obviously back-dated, and was issued at the inducement of Buttes, to deprive Occidental of its property. The British Government rejected this fraudulent decree, and refused to give effect to the attempted extension of Sharjah's territorial waters. The British Foreign Office advised the Ruler of Sharjah that his attempt to extend the territorial waters of Abu Musa from three to twelve miles violated the 1964 seabed border agreement between Sharjah and Umm, and violated the vested concession rights of Occidental. *The British Government also refused Buttes' request for permission to drill, on the ground that the proposed drilling site was within Occidental's concession area, and outside the Buttes concession area.*[1] Sharjah resisted and the matter was

[1] Britain's express language was: "the location lies in an area which was not included in the concession area specified in the

submitted to mediation. When the mediator ruled in favor of Umm and Occidental, however, Sharjah, in bad faith, rejected the mediator's ruling.[2]

Thus frustrated, Buttes took another tack. It persuaded Iran to assert a claim to the valuable portion of Occidental's concession. Iran, through the National Iranian Oil Company, announced in May 1970 that the Island of Abu Musa belonged to Iran and not to Sharjah, and claimed a twelve-mile limit for territorial waters of the island.

When Great Britain relinquished its rights and obligations as protecting power over the Trucial Sheikhdoms on November 30, 1971, the constraints on Buttes' manipulations ended. Under threat of forcible occupation of Abu Musa by Iran, the Ruler of Sharjah entered into an agreement with Iran providing that Iran and Sharjah would jointly occupy the island; that the oil concession granted by Sharjah to Buttes, including the illegally extended territorial water limits, would be "confirmed"; and that Iran and Sharjah would split the governmental royalties derived from the concession.

Iran then occupied Abu Musa (together with Sharjah) and patrolled the territorial waters extended to twelve miles. Umm had no means to prevent this seizure and occupation of a portion of its continental shelf, and its sovereignty over that portion was terminated by annexation.

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concession agreement between [Sharjah] and Buttes . . . on 29 December 1969 and as approved by Her Majesty's Government at that time and . . . the location lies in an area which was included in the concession agreement concluded at an earlier date between Umm and Occidental . . . ."

[2] The opinion of the court of appeals, through oversight, states incorrectly that *Umm*, rather than Sharjah, "refused to abide" by the mediator's decision. App. A at p. A-5; 577 F. 2d at 1200.

After the annexation, Sharjah and Iran confiscated Occidental's concession in favor of Buttes. The confiscation was uncompensated, and therefore illegal.

Buttes immediately began drilling operations in the very location of Occidental's oil find. Buttes later sold interests in its Sharjah concession to subsidiaries of Ashland Oil, Inc., Kerr-McGee Corporation, Skelly Oil Company and Cities Service Oil Company. Each of these companies, before acquiring its interest, was put on notice of Occidental's ownership of the concession.

In 1974, the defendants began to extract oil from Occidental's concession area and to ship it to the United States. Among these shipments were the three cargoes that were attached in Louisiana in these proceedings. Occidental has also attached some ninety other cargoes in proceedings instituted in state and federal courts in Louisiana and Texas, and in the Virgin Islands.[3]

B. The Theory of the Petitioner's Case

Occidental's cause of action arises from the following ultimate facts alleged in the complaint:

(a) The Ruler of Umm issued to Occidental a valid oil concession.

(b) Occidental made an important oil find. Thereafter, Sharjah and Iran annexed the area of the oil find.

(c) After the annexation, Sharjah and Iran confiscated Occidental's vested property right in its concession without compensation.

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[3] In every case, by prior stipulation, the oil was released immediately after seizure, upon an undertaking by the consignees to stand good for the value of the cargo.

(d) Buttes extracted the oil from Occidental's concession area and shipped the oil to the United States.

The legal theory of Occidental's claim is simple. After the annexation on November 30, 1971, Iran and Sharjah were obligated to respect vested concession rights within the annexed portion of Umm's continental shelf, under the rule of international law, applied repeatedly by this Court, that a change of sovereignty does not alter vested rights within the acquired territory.[4] The failure of Sharjah and Iran to honor Occidental's vested right in its concession constituted a taking of Occidental's property. Because the taking was uncompensated, it violated international law, and did not confer upon Sharjah and Iran, or upon anyone claiming through them, title to the confiscated concession or to the oil extracted from it.

Occidental's claim arises not from the annexation of Umm's continental shelf, but from the confiscation of its concession by Sharjah and Iran, which occurred after the annexation. Iran and Sharjah have carved up Abu Musa between them. So be it. Occidental does not challenge this *fait accompli*. To put it plainly, there is nothing in the case that will affect the boundary line of any of Iran's territories, no matter where they are. Similarly, the case will not affect Sharjah's or anyone else's boundary lines, no matter where they are.

There is nothing in Occidental's claim that will affect one cent of the royalties now being collected by Iran or any other sovereign from the oil being drilled on the original Occidental site. They have been collected and will continue to be collected without challenge by Occidental. All that is

[4] *United States* v. *O'Donnel*, 303 U.S. 501, 510-11 (1938); *Airhart* v. *Massieu*, 98 U.S. 491 (1879); *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 86-87 (1833).

involved in this case is that the oil, which was shipped *into the United States*, and which is the product of an illegal confiscation, is subject to a claim in American courts. No judgment for one cent beyond the property before the Court is requested or can be granted.

The respondents have, by complex argument and fear thoughts of involved issues, persuaded the court of appeals that this case is "unmanageable." Aside from the fact that American courts decide far more complex issues, the fright approach is an unworthy one. If the courts withdraw from deciding this case they return to the day when the United States was looked upon as a haven for stolen property and was the delight of thieves, to the consternation of the rightful owners. It was to eliminate this immoral position in which the United States found itself, aptly called the "thieves market", that Congress directed the courts to decide cases like this one. 22 U.S.C. §2370(e)(2).

C. Proceedings Below

Shortly after filing its complaint, Occidental served on Buttes a request for production of documents.[5] The defendants responded with a motion to stay all discovery, and a motion to dismiss the complaint. The motion was converted into a motion for summary judgment at the court's suggestion. The matter was submitted without an evidentiary hearing and with virtually no discovery, on the basis of the defendants' concession that they would not controvert any of the facts pleaded in the complaint. In reliance on this concession, the district court granted the defendants' motion to stay discovery. *For purposes of this*

[5] Civil Action No. 74-868 ("Dauntless Colocotronis") is an *in rem* action in admiralty. Buttes Gas & Oil Company, Skelly Oil Company, Kerr-McGee Corporation, Cities Service Oil Co., Ashland Oil, Inc., Juniper Oil Corporation, and certain of their subsidiaries and

appeal, therefore, the allegations of Occidental's complaint must be taken as true.

The motion for summary judgment was based on five grounds. The district court rejected four of these grounds, but granted summary judgment on the theory that the act of state doctrine prevented the court from reaching the merits of Occidental's claim. The district court refused to apply the provisions of 22 U.S.C. §2370(e)(2) ("the Hickenlooper Amendment"), which precludes application of the act of state doctrine in a case involving a claim based upon a confiscation in violation of international law.

The court of appeals, after hearing oral argument, asked the Department of Justice to file an amicus brief. The Department, in its brief, disagreed with the holding of the district court that the act of state doctrine would foreclose a determination of the validity of Occidental's concession. But the Department argued that Occidental's claim should nevertheless be dismissed, on the theory that a determination of the sovereignty of Umm at the time the concession was granted would present a nonjusticiable political question. This was a new argument, never before made.

Annexed to the Department's brief was a letter from the Legal Adviser to the State Department arguing that regardless of which theory was adopted, the court should not hear the case. The court of appeals yielded to this suggestion, abdicated its judicial function, and declined jurisdiction.

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affiliates intervened as claimants to the seized cargo. Civil Action No. 74-1192 ("Lykavitos") and Civil Action No. 75-0033 ("Anglo-Maersk") were filed in the Fourteenth Judicial District Court for the Parish of Calcasieu, as sequestration proceedings under Article 3501 *et seq.* of the Louisiana Code of Civil Procedure. The defendants removed both cases to the United States District Court for the Western District of Louisiana, on the basis of diversity of citizenship. The three cases were then consolidated.

REASONS FOR GRANTING THE WRIT

I.

The decision of the court of appeals undermines the rule of law in international affairs, offends the constitutional mandate of an independent judiciary and denies due process of law to parties relying on foreign boundaries determined by the United States.

The sole basis for the court of appeals' dismissal of Occidental's action was that it allegedly would have required resolution of a non-justiciable territorial dispute between Iran and Sharjah as to which of them owned the island of Abu Musa in 1969.[5a] This dispute, however, could not affect Occidental's claim. No matter who owned Abu Musa, under the law of the 3-mile limit to the territorial seas of nations, Occidental's concession site was clearly outside of that 3-mile territorial water limit. Thus the court of appeals' mistaken notion that the ownership of Abu Musa affected petitioner's claim, gave rise to the court applying the "political question" theory while in fact no such question existed in the case herein. In arriving at its decision, the court of appeals ignored the 3-mile limit recognized by the United States and substituted in its place a blind adherence to the transitory pleasure of the State Department as expressed in a letter from the Department's Legal Adviser.

[5a] The court of appeals said:

> [I]n order to resolve appellant's right to possess the oil, we would have to resolve the dispute over Abu Musa. The resolution of a territorial dispute between sovereigns, however, is a political question which we are powerless to decide.

App. A. at p. A-11; 577 F. 2d at 1203; see also the court of appeals' footnote 7:

> . . . a determination of sovereignty over Abu Musa is necessary to the ultimate resolution of the right to oil in this case. This question, however, we hold to be a political question and therefore non-justiciable.

App. A. at p. A-8, fn.7; 577 F. 2d at 1201, fn.7.

A. The Decision of the Court of Appeals Undermines the Rule of Law in International Affairs.

1. *The three-mile limit proclaimed by the Executive Branch has the force of law and is binding upon the courts.*

"The United States has been committed to the three-mile limit from the early days of its existence." Restatement (Second) of Foreign Relations Law, note to §15, at 40 (ALI 1965). Through its Executive Branch, the United States has consistently maintained that the three-mile breadth of the territorial sea is part of the substantive "law of nations" which "no nation may legally extend or enlarge by unilateral action." Foreign Relations of the United States, 1935, v. I, at 919 (State Dept. 1953). The United States has repeatedly proclaimed to the world that this substantive international law can be amended only by treaty; absent such a treaty, the United States does not recognize claims of territorial sovereignty seaward of three miles. Department of State Press Release 64, Feb. 25, 1970. The United States firmly maintains that any change in the law of the three-mile limit "is conditional on a satisfactory overall treaty." Department of State Bulletin, v. LXXI, no. 1832, at 233 (Aug. 5, 1974). No such treaty has been made.

In an effort to foster the rule of law in international affairs, the United States has sent notes of diplomatic protest to foreign governments whenever they have sought to extend their territorial seas through unilateral action. *See, e.g.,* United States note to Saudi Arabia, Foreign Relations of the United States, 1949, v. VI, at 157-60 (State Dept. 1977). In particular, with respect to Iran and Sharjah, the United States has declared illegal their attempts to

extend their territorial seas beyond three miles. In both cases, the United States expressly reserved the rights of American nationals (thus including Occidental) in international waters beyond three miles.

When *Iran* first attempted to extend its territorial sea, the United States protested as follows:

> The Government of the United States cannot recognize as valid the legislation under reference in so far as it purports to extend the dominion of Persia over the sea beyond three miles from its coast, and it is impelled therefore, to make full reservation of all its rights and the rights of its nationals.
>
> Foreign Relations of the United States, 1935, at 919.

Similarly, when *Sharjah* purported to extend its territorial sea to twelve miles around Abu Musa in 1970, the United States proclaimed that it "reserves its rights and those of its nationals in all areas . . . seaward of the traditional 3-mile limit." State Department Airgram to United States Embassy, London, dated July 22, 1970.[6]

Thus, the United States through its Executive Branch clearly refused recognition of Iran's and Sharjah's claims of territorial jurisdiction beyond three miles from the coast. This determination by the Executive is binding upon the courts. "[W]hen the Executive branch of the government, which is charged with our foreign relations, shall in its correspondence assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Williams* v. *Suffolk Insurance Co.*,

[6] This protest by the United States was addressed to the same fraudulent backdated decree under which Buttes claims title to the Occidental oil.

38 U.S. (13 Pet.) 414, 420 (1939). *See also United States* v. *California*, 332 U.S. 19, 33-34 (1947); *Guarantee Trust Co. of New York* v. *United States*, 304 U.S. 126, 138 (1937); *Jones* v. *United States*, 137 U.S. 202 (1890). "A policy of non-recognition when demonstrated by the Executive must be deemed to be as affirmative and positive in effect as a policy of recognition." *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944).

2. The letter from the State Department on which the court of appeals relied does not profess to change the law of the three-mile limit.

The letter from the Legal Adviser of the State Department relied upon by the court of appeals did not purport to change the law of the three-mile limit. It merely suggested that the court ought not to decide this case.

Therefore, the Legal Adviser's letter was just that, advisory, and could not and did not change the officially expressed position taken by the United States Government over and over again in its international relations that it adheres to the three-mile territorial water limit.

3. The court of appeals erroneously declined jurisdiction because of its mistaken view that it had to determine the dispute between Iran and Sharjah over Abu Musa; this dispute is irrelevant to Occidental's claim.

Occidental's oil find was located nine miles seaward of the island of Abu Musa and thus well outside the island's three-mile territorial sea, as recognized by our government. Occidental's grantor, Umm, had sole jurisdiction over that area for the exploitation of oil under the 1964 agreement executed through British auspices. App. A, at pp. A-3, 4; 577 F.2d at 1199. This agreement was concluded pursuant to Article 6, §2 of the 1958 Convention on the Continental Shelf of which the United States is a signatory. 15 U.S.T. 471, TIAS 5578.[7]

The sole basis for Iran's adverse claim to Occidental's oil find was the assertion that Abu Musa was an Iranian island, and that the island's territorial sea extended twelve miles from its coast under a unilateral Iranian decree. Similarly, Sharjah's sole basis for claiming Occidental's drilling site was that Abu Musa belonged to Sharjah and had a territorial sea of twelve miles under Sharjah's unilateral, secret, "unpublished" decree that was revealed in March 1970. Buttes itself, as late as 1972, cited as the sole basis of its alleged title the rights of Iran and Sharjah to the "entire 12-mile area around the island." Buttes Press Release of October 25, 1972.[8]

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[7] In addition to its other errors, the refusal of the court of appeals to take jurisdiction was a refusal to apply and interpret a treaty of the United States. "The judicial power shall extend to all cases . . . arising under . . . treaties . . . ." U. S. Const., Art. III, § 2. The 1958 Convention on the Continental Shelf was ratified by the United States and proclaimed by the President as taking effect as of June 10, 1964. 15 U.S.T. 471, TIAS 5578; 499 U.N.T.S. 311. The court of appeals erred when it held that "no manageable law exists to resolve disputed continental ownership." 577 Fed. 2d 1205; App. A. pp. A-15, 17. On the contrary, a treaty of the United States provided a body of law which the court was required to interpret and apply. It was the duty of the court, if necessary, to make that law "manageable" through the ordinary process of judicial construction.

[8] Since the three-mile limit is a binding rule of law, American courts must hold invalid the adverse claims of Iran and Sharjah to Occidental's drilling site. To overcome this legal barrier, Buttes for the first time on appeal raised the novel contention that the tiny island of Abu Musa possesses a continental shelf of its own extending beyond the limits of its territorial waters. But neither Iran nor Sharjah has ever claimed an independent continental shelf for Abu Musa. Buttes lacks the standing and

The court of appeals was wrong in believing that it would have to decide the adverse claims of Sharjah and Iran to the island of Abu Musa. It does not matter one whit whether Iran or Sharjah was right in its claim to Abu Musa. In either event, Occidental's concession stands unaffected because it is outside the three-mile limit of Abu Musa. To hold otherwise would do violence to the official position of the United States Government.

Therefore, contrary to the view of the court of appeals, this case does not present embarrassing, unmanageable or even difficult issues. It merely requires the court to apply the law of the three-mile limit adopted by our Executive Branch.

4. *This Court's policy of fostering a rule of law in international affairs is undermined by the decision below.*

In *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 764 (1972), Justice Brennan, writing for four members of this Court,[9] repeatedly appealed for a judicial policy which would promote the rule of law in international affairs. *Id.,* at 778; 793; 794. A "rule of law" exists to the extent that conduct is guided by general principles rather

capacity to assert sovereign rights unclaimed by the sovereigns themselves. Moreover, we ask this Court to take judicial notice of the 50-odd tiny islands similar to Abu Musa that are scattered throughout the Persian Gulf. To attribute independent continental shelves to these islands would make chaos of the present division of offshore mineral rights, and would come as a rude shock to the coastal states of the Gulf, including Iran, Sharjah, and Umm.

[9] Brennan, Stewart, Marshall and Blackmun, JJ. Though technically a dissent, Justice Brennan's opinion in fact represented the plurality of a Court divided 3-1-1-4. The remaining five justices disagreed with the dissenters on other points, but their opinions show that they share the dissenters' concern for a rule of law in the international sphere.

than momentary expediency. When the subject matter before any court extends into the international arena, the rule of law is advanced or retarded by the way the court exercises its jurisdiction and by the rules of decision it applies.

In this case, the court of appeals refused to give effect to the law of the three-mile limit which the United States has steadfastly proclaimed for nearly two centuries in its defense of the international rule of law. Instead, the Court's decision was controlled by a desire to avoid judicial proceedings which might embarrass the State Department at a given moment in the ever-changing configuration of foreign powers. App. A, at pp. A-14, 15; 577 F.2d at 1204. The result is that a momentary preference of the State Department has prevailed in our courts against a principle of law.

A government department charged with diplomatic functions may find it desirable in a turbulent world to yield from day to day to special pressures. The courts, however, have a different mission. The judicial department must uphold the rule of law.

B. The Decision of the Court of Appeals Offends the Constitutional Mandate of an Independent Judiciary.

In *First National City Bank, supra,* six members of this Court denied legal effect to the so-called "Bernstein letters." These were letters from the Legal Adviser of the State Department which professed to authorize the courts to inquire into the validity of foreign acts of state which otherwise would have been presumed valid under the act of state doctrine. See *Bernstein* v. *N.V. Nederlandsche-Amerikaansche,* 210 F.2d 375 (2d Cir. 1954).

Prominent among the reasons for this Court's rejection of the Bernstein letters was their interference in the judi-

cial process. "I would be uncomfortable with a doctrine which would require the judiciary to receive permission before invoking its jurisdiction. Such a notion, in the name of separation of powers, seems to me to conflict with that very doctrine." *First National City Bank* v. *Banco de Cuba,* 406 U.S. at 773 (Powell, J., concurring). In the same case, Justice Douglas said the Bernstein letters tended to make this Court "a mere errand boy for the Executive Branch, which may choose to pick some people's chestnuts from the fire but not others." *Id.* at 773. Similarly, Justice Brennan, joined by Justices Stewart, Marshall and Blackmun, said that the Bernstein letters "would require us to abdicate our judicial responsibility . . . ." *Id.* at 778. In a later case, Justice Marshall, noting this Court's disapproval of the Bernstein letters, said that "the task of defining the role of the Judiciary is for this Court, not the Executive Branch." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682, 724-5 (1976) (dissenting opinion joined by Brennan, Stewart and Blackmun, JJ.).

The instant case would bring before this Court for the first time the question of the validity of an "inverse Bernstein letter," *i.e.,* a letter from the Legal Adviser which urges the courts to *decline* jurisdiction of a case between two private litigants, both American nationals, which otherwise the court would have to decide. Inverse Bernstein letters offend the same constitutional principles as the disavowed Bernstein letters.

It was not law, but a letter, that the court of appeals felt compelled it to refuse jurisdiction. The court said, "[w]e are persuaded that a judicial determination would reflect a lack of respect for the executive branch, particularly the State Department. . . . A decision in this case, the State Department warns, would seriously impinge on executive

neutrality. *Therefore,* we are convinced that the issue of sovereignty over disputed territory is a political question. . . . " App. A, at pp. A-14, 15; 577 F.2d at 1204 (emphasis added).

The very formulation of this sentence which reveals the *non sequitur* expressed in the word "Therefore" demonstrates that the court of appeals resorted to the political question theory to comply with the State Department's "advice" rather than because it was convinced that there was such a question here. In short, the law was artificially accommodated to another branch of government.

The Executive cannot by mere suggestion change a cognizable claim into a nonjusticiable political question. Moreover, it is a dangerous error when a court permits "respect for the State Department" to control whether the door to the courtroom is open or locked to a litigant. The issue of the existence of a "case or controversy" is a *constitutional* question entrusted to the courts, and not to the State Department.

C. The Refusal of the Court of Appeals to Take Jurisdiction Denies Due Process of Law to Parties Relying on Foreign Borders Determined by the United States.

Occidental had the right to rely on the law of the three-mile limit. To the extent that the Executive makes and interprets international law, it must do so within the strictures of the Fifth Amendment. A law, once made, remains in force until repealed; the Executive cannot turn it on and off at will. Nor can a party whose rights have been reserved under a principle of law be deprived of the law's protection because the facts of his case displease a governmental department. Due process abhors any doctrine

whereby "similarly situated litigants would not be likely to receive even-handed treatment." *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. at 793 (Brennan, J., dissenting).

II.

Even if the law of the three-mile limit were not dispositive, this Court would still be required to decide this case; otherwise, the litigants would be relegated to self-help.

The decision of the court of appeals in this case is the only reported decision in American law holding that a court may not decide a case involving the private rights of private parties to property before the court, merely because the adjudication of those private rights touches upon an issue of sovereignty or boundaries. Nor is there any other reported decision holding that if the Executive Branch fails or refuses to make a determination with respect to sovereignty or boundaries, a court may not make such a determination in the course of adjudicating private rights. In its *amicus* brief filed in the court of appeals, the Department of Justice conceded, at page 7, "we have uncovered no case in which the Supreme Court has specifically held that cases involving boundary disputes raise nonjusticiable political questions".[10]

There is one case in which this Court, by way of dictum, has specifically addressed this issue. *Williams* v. *Suffolk*

[10] Even the district court below, though it dismissed under the act of state doctrine, recognized that there is no "unassailable rule of law . . . that a United States court cannot decide a case involving the private rights of private parties to property if the adjudication requires a collateral determination with respect to boundaries." 396 F.Supp. at 468.

Insurance Company, 38 U.S. (13 Pet.) 414 (1839). The *Williams* case involved the legality of the seizure of an American seal fishing vessel by the Government of Buenos Aires, and required a determination of sovereignty over the Falkland Islands. This Court made it quite clear that, in the absence of a determination by our executive or legislative branch, the issue of sovereignty over foreign territory is "an open question", into which a court may inquire. The Court went on to hold that it was "saved from this inquiry" because the issue of sovereignty over the islands had been resolved by our Executive. 38 U.S. (Pet.) at 419.[11]

The fact that primary conduct of foreign relations is entrusted to the Executive Branch is no obstacle to the power of an American court to decide a collateral issue of boundaries. If the Executive has made a substantive determination of sovereignty, the court will ordinarily respect that position. If the position of the Executive cannot be ascertained, however, then the Court is bound to decide the case independently.

In *Baker* v. *Carr,* 369 U.S. 180 (1962), this Court reviewed the status of the political question doctrine, including the applicability of the doctrine to cases involving foreign relations. 369 U.S. at 211-213. The Court pointed out that "it is wrong to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance". 369 U.S. at 211. The opinion in *Baker* v. *Carr* draws a distinction between cases in which the Executive has made a determination, and cases in which there has been "no conclusive governmental action", and suggests that the judiciary may make its own determination "in the

[11] See also *Foster & Elam* v. *Neilson,* 27 U.S. (2 Pet.) 253, 307 (1829). ("If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous."); *De la Croix* v. *Chamberlain,* 25 U.S. (12 Wheat.) 599 (1827).

absence of recognizedly authoritative executive declaration". 369 U.S. at 213. With respect to issues of foreign sovereignty in particular, the Court stated merely that "the judiciary *ordinarily* follows the executive as to which nation has sovereignty over disputed territory", 369 U.S. at 212 (emphasis added).

In the present case, the court of appeals has abandoned this Court's careful statement in *Baker* v. *Carr* in favor of a sweeping rule of nonjusticiability that would prevent an American court from reaching any decision at all in a case that touches upon an issue of foreign boundaries, past or present, if the Executive has refrained from taking a position:

> Just as the judiciary will follow an executive determination as to which nation has sovereignty over a disputed area [citation], so must the judiciary refuse to decide the dispute in the absence of executive action because of that absence of direction.
>
> App. A, at pp. 13, 14; 577 F.2d at 1203-04.

This holding of the court of appeals is erroneous. The political question doctrine, where applicable, requires a court to decide the merits of a case by deferring to an executive or congressional position. The doctrine embraced by the court of appeals is something very different, and would require the Court to decline to decide the merits by deferring to an executive *non*position. The political question doctrine does not, and should not, encompass this rule of nondecision.[12]

[12] The court of appeals also disregards the distinction between a determination of present sovereignty and a determination of former sovereignty. Occidental does not assert that Umm is now sovereign over the valuable portion of Occidental's concession area, but merely that Umm was formerly sovereign on November 18, 1969, when the concession was granted. It is a central element of Occidental's theory that Umm's sovereignty was terminated by annexation at the end of 1971, and that Sharjah and Iran assumed sovereignty thereafter. The relief that Occidental seeks—recovery of the oil extracted from its confiscated concession—would not, directly or indirectly, challenge the present sovereignty of Iran or Sharjah over the confiscated concession area, or any of their present boundary lines.

The decision of the court of appeals misapplies the language of *Baker* v. *Carr* and conflicts with clear expressions of this Court in earlier decisions. The court of appeals abdicated its duty to decide the rights of the litigants in this case, in deference to a mistaken notion of the separation of powers.

The ruling of the court of appeals creates a decisional vacuum, in which the claims of the parties can never be adjudicated, regardless of merit. The result is a form of anarchy, in which the victor may keep his spoils, free from the rule of law. The doctrine of nondecision, if allowed to stand, would put a premium on raw power and self-help. Under this doctrine, if a victim of a confiscation would piratically seize a cargo on the high seas and bring it into the United States, the contrary claimant would be foreclosed from any remedy. The "pirate" would be immune from suit and would then prevail, not on the merits of his claim, but merely because he would be the defendant, and not the plaintiff.

The decision below raises important issues relating to the role of the courts and the relationship among branches of government. These issues warrant the attention of this Court on review.

III.

The issue in this case which the court of appeals denominated a political question is indistinguishable from an act of state issue and is therefore controlled by the Hickenlooper Amendment.

Congress enacted the Hickenlooper Amendment in 1964 for the express purpose of affording relief to victims of illegal foreign confiscations who had previously been denied access to our courts. The amendment provides:

> "*Notwithstanding any other provision of law,* no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right of property is asserted by any party • • • based upon • • • a confiscation or other taking • • • by an act of state in violation of the principles of international law • • •, 22 U.S.C. §2370(e)(2). (emphasis supplied)

The Hickenlooper Amendment was designed to alter the role of the United States as a "thieves market" where the confiscator was immune from suit by the victim. 110 Cong. Rec. 18936, 19555 (1964):

> "It insures that *however the case may arise or the act of state doctrine be invoked,* a party who had suffered an expropriation in violation [of international law] may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States • • •" (*Ibid.,* page 23680). (Emphasis supplied).

In the present case, the district court dismissed on the ground of the act of state doctrine, and refused to apply the Hickenlooper Amendment. The court of appeals purported to circumvent the Hickenlooper Amendment entirely by sustaining the dismissal not on the act of state doctrine, but on what it called a "slightly different ground"—the notion that the case presents a nonjusticiable political question. App. A, at p. A-1; 577 F.2d at 1198.

The reasons the court of appeals used in holding the case nonjusticiable under the political question doctrine are identical to the reasons that have been expressed from time to time to justify the act of state doctrine—imagined sensitivity to foreign relations or difficulty of the issues, unmanageability, regard for the separation of powers, avoidance of embarrassment to the Executive Branch. It was precisely these contentions that Congress rejected when it enacted the Hickenlooper Amendment.

Under Hickenlooper, the courts are required to assume jurisdiction over all cases involving illegal confiscations of property which is later shipped into the United States regardless of the issues involved. The courts have no discretion under the statute. The directions of Congress to hear and determine the merits of such cases are clear and unconditional, and may not be avoided by the judiciary through abstention or otherwise.

The district court refused to apply the Hickenlooper Amendment. The court of appeals questioned its constitutionality. Hickenlooper is constitutional and it is clearly applicable to this case. *Banco Nacional de Cuba* v. *Farr,* 243 F. Supp. 957 (S.D.N.Y. 1965), aff'd 383 F.2d 166 (2 Cir.), *cert. denied* 390 U.S. 956, *reh. denied* 390 U.S. 1037 (1968).

The fact that every confiscation of property in violation of international law involves a political question does not render the matter nonjusticiable, nor does it foreclose the court from inquiring into its legality under Hickenlooper.

In the *Farr* case, the Hickenlooper Amendment was challenged on the ground that it represented an impermissible encroachment upon the power of the President and Executive Branch over foreign relations in violation of the doctrine of separation of powers. This is the same ground noted by the court below in support of its decision.

In upholding the validity of Hickenlooper, the district court in the *Farr* case held that the statute related to a subject "in which Congress had an interest, and in respect to which it could give direction" (243 F.Supp. at 972, 973). On appeal, the court of appeals for the Second Circuit confirmed the constitutionality of Hickenlooper. It held that "the act of state doctrine • • • was not constitutionally compelled", and rejected the notion that illegal confiscation by foreign states "presented a non-justiciable political question" beyond the court's power to adjudicate under Hickenlooper (383 F.2d at 180-1). This holding is entirely in accord with the decisions of this Court.

In *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964) this Court held that the act of state doctrine is a "principle of decision • • • compelled by neither international law nor the Constitution" and that said doctrine "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state" (376 U.S. at 423, 427). Similarly, in *First National City Bank,* this Court held that the act of state doctrine was "judicially created to effectuate general notions of comity among • • • the respective branches of the Federal Government", and did not have "its roots • • • in the Constitution" (406 U.S. at 762, 765).

In the *Farr* case, this Court twice denied certiorari. On each occasion, it refused to review the holdings of the Court of Appeals for the Second Circuit that the act of state doctrine was not constitutionally compelled, and that the judiciary was free to inquire into any act of confiscation under Hickenlooper even though the underlying issue of any such inquiry involved a political question.

In *Sabbatino,* this Court held that the validity of a foreign act of state in certain circumstances is a "political question" not cognizable in our courts. The purpose of the Hickenlooper Amendment was to reverse this holding by directing the courts to assume jurisdiction over these "political questions" in determining the merits of the controversy. Thus, whether the case presents a political question or an act of a foreign state, in neither event is the court precluded from making a merit determination under the Hickenlooper Amendment in a case involving the unlawful taking of property by a foreign power in violation of international law.

In declining jurisdiction herein, the court of appeals repudiated the very purpose of Hickenlooper. In refusing to determine the merits of the unlawful confiscation, the court has rejected the statutory command of Congress. In dismissing the action, the court of appeals has left the victim of the illegal confiscation without a judicial remedy in violation of the statute. Unless the decision below is vacated by this Court, the Hickenlooper Amendment will be devoid of all meaning, and will be totally ineffective in preventing the United States from again becoming a "thieves market" for the disposal of our citizens' property illegally obtained through confiscation.

The importance of the issue presented by this case goes far beyond the private rights of the litigants, and deals

essentially with the rights of *all* victims of confiscation to seek legal redress under a federal statute that was enacted for that very purpose. The case presents a question of first impression under a statute that has not been construed by this Court since its enactment, and therefore warrants this Court's review. *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964); *United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946).

IV.

The refusal of the court of appeals to hear this case offends the strong Congressional policy favoring judicial determination of the property claims of American victims of foreign confiscations.

Even if the Hickenlooper Amendment were to be so narrowly construed as to control only those issues explicitly denominated as acts of state, the statute nevertheless embodies a strong Congressional policy that the victims of foreign confiscation should not be left helpless but should have their day in court.

Even before Hickenlooper, it was settled law that in matters involving political questions, "it is wrong to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance". *Baker* v. *Carr*, 369 U.S. 180, 211 (1962).

In *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. at 790, a plurality of judges of this Court held that "the task of defining the contours of a *political question, such as the act of state doctrine,* is exclusively the function of this Court", citing *Baker* v. *Carr, supra* (emphasis added). On the facts of this case, this Court, in "defining the contours", should give due regard to the Hickenlooper Amendment and to the strong policy of justiciability that it embodies. The policy of the amendment dictates that when an American citizen comes into an American court seeking to recover illegally confiscated property, the American court may no longer say to that citizen, (whether under the act of state doctrine or on a "slightly different ground"), "However meritorious your claim, our hands are tied".

The trumpet call of justice sounded by the Congress should not have been disregarded by the court of appeals even if only a matter of discretion were involved.

Entirely apart from the mandate of Hickenlooper, there is a philosophical compulsion in its logic. It has a unique moral impact. In a world in which terror is not unknown in many parts of the globe, may a wrongdoer cloak himself in technical immunity? Should the courts of our land aid him in such dishonorable evasion?

The pronouncement of this Court will be awaited eagerly by constitutionalists as well as by hapless victims of predators.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for discovery and a trial on the merits.

Respectfully submitted,

LOUIS NIZER
GERALD MEYER
NEIL A. POLLIO
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
40 West 57th Street
New York, New York
10019

THOMAS M. BERGSTEDT
SCOFIELD, BERGSTEDT & GERARD
1114 Ryan Street
P. O. Box 1136
Lake Charles, Louisiana
70601

J. BOND SMITH, JR.
BIGHAM, ENGLAR, JONES & HOUSTON
14 Wall Street
New York, New York
10005

HENRY J. READ
MONTGOMERY, BARNETT, BROWN & READ
806 First National Bank of Commerce Building
New Orleans, Louisiana
70130

DAVID STONE
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana
70130

Attorneys for Occidental of Umm Al Qaywayn, Inc., Petitioner

Appendices

APPENDIX A

Opinion of the Fifth Circuit

OCCIDENTAL OF UMM AL QAYWAYN, INC.,

Plaintiff-Appellant-Cross Appellee,

—v.—

A CERTAIN CARGO OF PETROLEUM LADEN ABOARD THE TANKER DAUNTLESS COLOCOTRONIS, etc., ET AL.,

Defendants-Appellees-Cross Appellants.

No. 75-3088.

United States Court of Appeals,
Fifth Circuit.

Aug. 9, 1978.

Before THORNBERRY, MORGAN and INGRAHAM, *Circuit Judges.*

LEWIS R. MORGAN, *Circuit Judge*:

In these conversion actions, consolidated on appeal, the federal court is asked for a decision we consider impossible. The immediate question is whether the district court erred in granting appellee's motion for summary judgment. The district court determined that it should refrain from deciding the issue on the merits, the rights to oil extracted from the Persian Gulf, because the decision would call into question the acts of foreign states. We dismiss on the slightly different ground that the question presented is political, being both constitutionally devolving on the

executive and judicially unmanageable, and therefore, not a "case or controversy" within Article III of the Constitution. On appellee's counterclaim to enjoin appellants from further litigation in this and other federally cognized jurisdictions, we reverse the district court and grant the injunction.

A thorough factual development is a necessary prerequisite to analysis.

A. Geography.

The scene for this political drama is the exotic Persian Gulf, once noted for the Arabian nights, now famous and important as a source of oil to light those nights. On the southern "lip" of the mouth of the Gulf lie the Trucial Sheikhdoms of Umm al Qaywayn (hereafter Umm), Sharjah, and Al Ajiman. Situated near the mouth of the Gulf, about 40 miles northwest of Umm, is the tiny island of Abu Musa. The island is also approximately 50 miles due south from Iran, the country with the largest contiguous border on the Gulf.

B. History, relatively ancient.

For almost a century, Great Britain had been the "protectorate" of the Trucial Sheikhdoms, including Umm and Sharjah. Pursuant to the treaty establishing this relationship, the United Kingdom was responsible for the Sheikhdoms' international relations, defense, and internal relations among the individual states. This protectorate jurisdiction included all the territories and territorial waters of the Sheikhdoms and territorial waters. As provided by the treaty, the protectorate ended in November 30, 1971.

During the course of this protectorate, a dispute over the sovereignty of Abu Musa had existed between Great Britain as agent of Sharjah, and Iran.[1] For example, the India Survey Map of 1897 represented the island in the colors of Persia (now Iran), as did the Viceroy's unofficial map of 1892. Later, in April of 1904, the dispute flared as the Persian government placed custom officials on the island and flew the Persian flag. This establishment of sovereignty was short-lived, however, and the evidence was quickly removed at the demand of the British government. Persia did not abandon its claim with this setback, however. In 1923, Persia reasserted its claim to Abu Musa by protesting the leasing, by Great Britain, of mineral rights to the island. In 1930, Great Britain and Persia discussed settlement of the dispute, but no accord was reached.

C. Modern History.

In the early 1960's, because of rising worldwide energy demands and the growth of offshore drilling technology, the Persian Gulf was becoming hot property. In 1964, perhaps as a response to this increased demand, Umm and Sharjah entered into an agreement, under the auspices of the British, establishing their territorial waters and continental shelf borders. This treaty not only established the territorial waters of the parties, but also established their respective continental shelf. The agreement was embodied in an admiralty map establishing the continental shelf of

[1] Appellant contends that the district court erred in permitting appellees to introduce evidence of a longstanding dispute between Iran and Sharjah over Abu Musa because of appellees' agreement to limit discovery on the issue. Even if the agreement could be deemed a stipulation the federal court is not bound by a factual stipulation that will impact on its jurisdiction. Just as the court will not be bound by the pleadings in collusive federal question cases, *Lord* v. *Veazie*, 8 How. 251, 12 L.Ed. 1067 (1850) and collusive diversity claims, *Caribbean Mills, Inc.* v. *Kramer*, 392 F.2d 387 (5th Cir. 1968), so would the court not be bound by stipulations on which the existence of a "case or controversy" might turn.

Umm as extending to the three-mile territorial waters of Abu Musa, recognized by the British as Sharjah's possession, giving Umm 37 miles of the intervening continental shelf.

On November 18, 1969, appellant and the Ruler of Umm contracted that appellant would have the exclusive right to explore for and extract oil within Umm, its continental shelf, and its territorial waters for forty years. The boundaries to this concession conformed to those established for Umm by the treaty with Sharjah of 1964. The British Foreign Office ratified the concession agreement, as a condition precedent required under the protectorate. A month later, Sharjah granted Buttes Oil Company, appellees' predecessor, a similar concession to extract oil from its territories. The boundaries of the Buttes concession also conformed to the 1964 treaty and the agreement was subsequently ratified by the British Foreign Office.

No conflict existed between the parties until March 25, 1970, when Buttes Oil and Gas Company notified the British representative to the Sheikhdoms that Buttes intended to drill for oil within the Occidental concession area, approximately 31 miles from Umm, 9 miles east of Abu Musa. Indeed, the drilling location coincided with that suggested by Occidental's exploratory testing. Also at that time, the British agent was made aware of a Sharjah decree purporting to extend its territorial waters from three to twelve miles, including those of Abu Musa. Of course, this unilateral decree did substantial violence to the 1964 treaty, and the British Foreign Office rejected the subsequent amendment of Buttes' concession agreement with Sharjah to reflect the extension. Additionally, the Buttes' request to drill was also denied by the British Government. Although the Foreign Office considered the unilateral action in violation of international law, it strove to bring about

an amicable solution. Although Umm and Sharjah were persuaded by the United Kingdom to mediate their claims, mediation failed when Umm refused to abide by the mediator's decision.

Meanwhile, to further muddy the political waters, in a letter dated May 28, 1970, appellant was informed by the National Iranian Oil Company that it should desist all drilling operations in its concession area. The stated basis for this demand was that because Abu Musa was an Iranian possession, and because Iran recognizes twelve mile territorial limits, Occidental concession was within Iran's territories. Faced with the probability of intervention by Iran, the British Government maintained the suspension of all drilling in the disputed area.

On November 26, 1971, the dispute between Iran and Sharjah over Abu Musa was settled, at least practically and prospectively.[2] This agreement between Iran and Sharjah occurred only four days prior to the expiration of the British protectorate over the Trucial Sheikhdoms. Pursuant to this agreement, the island was essentially divided, and Sharjah's concession with Buttes was ratified and the future royalties were split between the sovereigns. On November 30, 1971, Iranian troops landed on Abu Musa, and the Iranian navy began patrolling the waters of the island. Shorn of the protection of the British Government, Umm had no means to protect its territories as defined under the 1964 agreement, and Occidental was without protection as well. Buttes began drilling immediately with salutory results. Buttes later sold interests in the oil to appellees, Ashland Oil Inc., Kerr McGee Corp., Skelly Oil Company, and Cities Services Company. Each was put

[2] By the terms of this partition agreement neither Sharjah nor Iran abandoned its claim to Abu Musa in favor of the other.

on notice of Occidental's claim. In 1974, appellants began extracting oil from the disputed concession area, and among the shipments of this oil to the United States were those aboard the "Dauntless Colocotronis," "Lykavitos," and the "Anglo-Maersk," which were seized in proceedings.[3]

At least among the sovereigns, the rights to the royalties from the area were definitely settled. Some time after the Iranian occupation of Abu Musa, the Rulers of Umm and Sharjah agreed to divide royalties payable to Sharjah with Umm receiving thirty percent. Appellant suffered its final political reverse when in June of 1973, the Ruler of Umm terminated Occidental's concession for failure to pay rentals due under the contract.

D. History of the Case.

Prior to analysis of the case, a brief legal history of the dispute is helpful. The appellants and appellees' predecessors have once before litigated the underlying basis of their dispute. In *Occidental Petroleum Corporation* v. *Buttes Gas and Oil Co.*, 331 F.Supp. 92 (C.D.Cal.1971), aff'd, 461 F.2d 1261 (9th Cir. 1972), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221, appellants brought an antitrust action against Buttes, and Clayco Petroleum Company and certain officers of the corporations alleging a conspiracy among the defendants to oust appellant from its concession. This action was filed more than eight months prior to the Iranian occupation of Abu Musa, and years prior to the exportation of oil. The district court held, and the court of appeals affirmed, that the court was

[3] Immediately after the seizures, the oil is released to the appellees as provided by agreement. The appellees have not been required to post bond.

precluded from piercing the veil of sovereign action by the "act of state" doctrine[4] and granted summary judgment. Although appellee contends that the Ninth Circuit case is *res judicata* for the case *sub judice*, we need not decide the question because we hold that we lack jurisdiction.

Actions No. 74-1192 and No. 75-0033 were brought as diversity actions.[5] Action No. 74-868 was brought as an *in rem* action in admiralty. The district court granted appellee's motion for summary judgment in the diversity actions holding that because the actions of foreign sovereigns were called into dispute, the "act of state doctrine" required the court to refrain from deciding on the merits. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). Moreover, the district court concluded that, under the circumstances, the Hickenlooper Amendment, 22 U.S.C.A. 2370(e)(2) (Cum. 1977), did not

[4] In 1897 the Supreme Court formulated what has become known as the "act of state" doctrine. The Court held that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897). This is not an abstention doctrine, but rather resembles a conflicts of laws principle. See *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 62 L.Ed. 733 (1917). Although in one decision the Court stated both that the doctrine had constitutional underpinnings and the doctrine was not compelled by the Constitution, the better view would be that the doctrine is constitutionally compelled by the concept of separation of powers and placement of plenary foreign relations powers in the executive. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed. 2d 804 (1964).

[5] The civil actions were first brought in the Fourteenth Judicial District Court for the Parish of Calcasieu as sequestration proceedings pursuant to Article 3501 of the Louisiana Code of Civil Procedure. The appellants, removed to the federal district court of the Western District of Louisiana, claim diversity of citizenship.

prevent such abstention.[6] The district court dismissed the admiralty action holding that admiralty jurisdiction was absent because if any conversion occurred, it occurred at the well-head not on the seas. Because we hold that no case or controversy exists, we dismiss all three claims for want of jurisdiction, but on the common ground that a resolution would involve a political question.[7]

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[6] In response to the refusal of the Supreme Court to pierce the sovereign veil in *Sabbatino*, Congress passed the so-called Hickenlooper Amendment designed to prevent such abstention. The amendment provides, in pertinent part:

> Notwithstanding any other provision of law, no court in the United States shall decline on the grounds of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

22 U.S.C.A. § 2370(e)(2) (Cum. 1977). It should be noted that if the act of state doctrine is constitutionally compelled, as was both suggested and negated in *Sabbatino*, the Hickenlooper Amendment would be ineffective. See note 4, *supra*.

[7] As will be developed *infra*, a determination of sovereignty over Abu Musa is necessary to the ultimate resolution of the right to the oil in this case. This question, however, we hold to be a political question and therefore non-justiciable. Note well that this question would also have to resolved under the "act of state" doctrine.

A political question clearly emerges under the proper analysis. Although, whether a political question is present and the court lacks jurisdiction are issues committed to federal law, we need to address such questions *only* if they would arise in the diversity action framework.[8] *See Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Therefore, we must analyze appellant's claim as it would be tried, to determine whether a political question will emerge.[9] Shorn of its factual complexity, appellants claim a tortious conversion of oil. Because this is a diversity case, we apply the law of the forum. Louisiana, to the claim. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Additionally, because the operative facts occurred outside of Louisiana, we must also apply Louisiana's conflicts principles to determine which forum's law to apply. *Klaxon* v. *Stentor Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Applying these principles, we find that to successfully maintain its tortious conversion action, appellant would have to establish its

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[8] We analyze the question with regard to the diversity action only because the procedure is more involved. The political question emerges directly under admiralty jurisdiction because we would immediately apply international law as a matter of federal law. See *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed. 2d 56, *reh. denied*, 366 U.S. 941, 81 S.St. 1657, 6 L.Ed.2d 852 (1961). As a matter of federal law the district court would then determine whether the conversion violated the principles of international law.

[9] Appellant complains that the court is unduly delving into the merits to determine the presence of a political question. Just as it is necessary to delve into the "merits" of a case to determine whether the claimant has sustained an injury in fact to determine standing, *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153, 156, 73 S.Ct. 609, 97 L.Ed. 918 (1953), so must we analyze the legal "merits" of the instant case in order to determine whether a case or controversy exists.

right to possess the oil at the time of conversion.[10] Appellant apparently contends that the conversion occurred when appellant was supplanted by Buttes through the intervention of Iran, sometime after November 30, 1971.[11] Because, as a matter of international law, one who receives an interest in land which is in dispute between sovereigns

[10] In *Importsales* v. *Lindeman*, 231 La. 663, 92 So.2d 574 (1957), the Louisiana Supreme Court stated that the essence of conversion is the wrongful deprivation of the claimant's possession, to which he is rightfully entitled. Thus, in order to successfully maintain a conversion action, appellant would have to show that at the time of conversion it was entitled to possession of the res. As a matter of conflicts, if this action did not involve acts of foreign states, a Louisiana court would apply the law of the forum in which the conversion occurred to determine whether appellant was entitled to possession. *See Matney* v. *Blue Ribbon Inc.*, 12 So.2d 249, 253 (La. App. 1942); *Quickkick* v. *Quickkick International*, 304 So.2d 402, 406 (La. App. 1974). Because appellee traces its title to the oil to acts of the sovereigns of Sharjah and Iran in supplanting appellant with Buttes, however, a court setting in Louisiana would follow the "act of state" doctrine and accept the act of the sovereign as a rule of decision. *Monte Blanco Real Estate Corp.* v. *Wolvin Line*, 147 La. 563, 85 So. 242 (1920). It is clear that the Louisiana Supreme Court intended that the act of state doctrine operate as a conflicts principle and that Louisiana courts will accept and apply as law the acts of foreign sovereigns. The Louisiana Supreme Court also made it abundantly clear that it considered the act of state doctrine mandated by federal law. The Hickenlooper Amendment, however, prevents *any* United States court from applying the *federal* act of state doctrine if the confiscation violated international law. A Louisiana court, therefore, would apply international law to determine whether the Hickenlooper Amendment is applicable. Because the Hickenlooper analysis is federal, however, the Louisiana court would be bound by the international law as developed by the Supreme Court in *Poole* v. *Fleeger*, 36 U.S. 185, 9 L.Ed. 680 (1837) and *Coffee* v. *Groover*, 123 U.S. 1, 8 S.Ct. 1, 31 L.Ed. 51 (1887).

[11] The explanation for appellant's ambiguity with regard to the conversion may be the mistaken conception that the Hickenlooper Amendment in some way provides a cause of action. At most, the amendment is a federal conflicts principle; at least, a mandate to the states to follow state law, not the federal "act of state" doctrine.

takes subject to the dispute, *Coffee* v. *Groover*, 123 U.S. 1, 29-30, 8 S.Ct. 1, 31 L.Ed. 51 (1887); *Poole* v. *Fleeger*, 36 U.S. 185, 9 L.Ed. 680 (1837),[12] appellant must necessarily develop Umm's right to undisputed possession of the portion of the continental shelf where the oil was extracted at the time the interest was passed, 1969. It is evident from the record, however, that the sovereignty, Abu Musa, and, derivatively, its continental shelf was in dispute between Iran and Sharjah (through Great Britain). Therefore, in order to resolve appellant's right to possess the oil, we would have to resolve the dispute over Abu Musa. The resolution of a territorial dispute between sovereigns, however, is a political question which we are powerless to decide.

Throughout the history of the federal judiciary, political questions have been held to be nonjusticiable and therefore not a "case or controversy" as defined by Article III. In *Ware* v. *Hylton*, 3 Dall. 199, 300, 1 L.Ed. 568 (1796), the Supreme Court recognized that in the realm of foreign relations policy considerations render issues incompetent for a decision by the court. In *Marbury* v. *Madison*, 1 Cranch 137, 164-166, 2 L.Ed. 60 (1803), Chief Justice Marshall acknowledged the existence of a class of cases which involve a "mere political act of the executive" and which

[12] It is arguable that the conversion did not occur until the oil was actually severed from the realty in 1974. At that time, however, the boundary disputed was settled among the sovereigns, at least practically. Application of *Coffee* and *Poole* would directly result in vesting title in the appellees. It is also arguable, however, that because Iran and Sharjah still refuse to recognize each other's claim, the dispute was not settled as a matter of international law. See note 2, *infra*. Therefore, we only use these cases for the proposition that under international law if a dispute exists at the time of taking, in the instant case, 1969, when the concession was granted by Umm, then appellant took subject to that dispute. As has been developed, *supra*, the sovereignty was disputed in 1969.

were placed by the Constitution in the hands of the executive. The Supreme Court therefore appreciated that the genesis of the political question is the constitutional separation and dispersement of powers among the branches of government. In *Coleman* v. *Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), the Supreme Court clearly recognized that the political question doctrine partakes not only of the existence of separation of powers, but also of the limitation of the judiciary as a decisional body. The Court stated: "In determining whether a question falls within [the political question category], the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." The Court was merely admitting that they were not tribal wisemen dispensing divinely or theoretically inspired judgments, but were a court limited to the application of predetermined law.

In *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court extensively reviewed the history and evolution of the political question. As a result of this survey, the Court identified a number of basic characteristics or considerations relevant to the existence of a political question. The Court held that the inextricable presence of one or more of these factors will render the cas nonjusticiable under the Article III "case or controversy" requirement, and therefore, the Court would be without jurisdiction. In this most definitive pronouncement, the Court identified the following factors as relevant to the affirmative determination of the existence of a political question:

> (1) "a textually demonstrable commitment of the issue to a coordinate political department"

> (2) "a lack of judicially discoverable and manageable standards"
>
> (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"
>
> (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"
>
> (5) "an unusual need for unquestioning adherence to a political decision already made"
>
> (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"

369 U.S. at 217, 82 S.Ct. at 710. In the instant case, nearly every one of the factors is present and the vitality of the political question in the arena of foreign relations is abundantly demonstrated.

The ownership of lands disputed by foreign sovereigns is a political question of foreign relations, the resolution or neutrality of which is committed to the executive branch by the Constitution. As has been demonstrated, to determine whether a tortious conversion has occurred, it is necessary to determine the sovereign ownership of the portion of the continental shelf from which the oil was extracted. Although sovereigns are not directly involved, a judicial pronouncement on the sovereignty of Iran or Sharjah would be unavoidable. Such a determination is constitutionally reserved to the executive branch, however. Just as the judiciary will follow an executive determination as to which nation has sovereignty over a disputed area, *United States* v. *Klintock*, 5 Wheat. 144, 149, 5 L.Ed.

55 (1820), so must the judiciary refuse to decide the dispute in the absence of executive action because of that absence of direction. That is, in the language of *Baker* v. *Carr, supra,* the question of sovereignty is committed to the executive branch by the Constitution, and decision of the issue is impossible in the absence of the executive policy decision. Additionally, we are persuaded that a judicial determination would reflect a lack of respect for the executive branch, particularly the State Department. Contained in the Government's amicus brief is a letter from the State Department[13] indicating the importance of

[13] In pertinent part the letter states:

> Your Division has asked for our views concerning certain aspects of the case of *Occidental of Umm Al Qaiwain* [sic] *Inc.* v. *A certain Cargo of Petroleum Laden Aboard the Tanker "Dauntless Colocotonic,"* [sic] *Etc., et al., C.A. 5, No. 75-3088.*
>
> It is our understanding that the disposition of this case would require a determination of the disputed boundary between Umm Al Qaiwain on the one hand and Sharjah and Iran on the other at the time Umm Al Qaiwain granted the concession in issue to Occidental. It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here.
>
> The extent of territorial sovereignty is a highly sensitive issue to foreign governments. Territorial disputes are generally considered of national significance and politically delicate. Even arrangements for the peaceful settlement of territorial differences are often a matter of continued sensitivity.
>
> These considerations are applicable to the question of Umm Al Qaiwain's sovereignty over the continental shelf surrounding Abu Musa at the time of the concession to Occidental and to the subsequent arrangements worked out among the affected states. For these reasons, the Department of State considers that it would be potentially harmful to the conduct of our foreign relations were a United States court to rule on the territorial issue involved in this case.
>
> We believe that the political sensitivity of territorial issues, the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention.
>
> We do not believe that this judicial self-restraint should turn on such analytical questions as whether the so-called Act of State doctrine which is traditionally limited to governmental actions within the territory of the respective state can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties. As a result, we are of the view that the court should be encouraged to refrain from setting the extent of Umm Al Qaiwain's sovereign rights in the continental shelf between its coast and Abu Musa at the time of its grant of the concession to Occidental.

neutrality in the politically and economically sensitive Middle East.[14] A decision in this case, the State Department warns, would seriously impinge on executive neutrality. Therefore, we are convinced that the issue of sovereignty over disputed territory is a political question reserved to the executive branch.

The issue of sovereignty is political not only for its impact on the executive branch, but also because judicial or manageable standards are lacking for its determination. To decide the ownership of the concession area it would be necessary to decide (1) the sovereignty of Abu Musa, (2) the proper territorial water limit and (3) the proper allocation of continental shelf. A judicial resolution of the dispute over Abu Musa between Iran and Sharjah is clearly impossible. In their external relations, sovereigns

[14] In determining whether to abstain or dismiss because of conflicting executive interest, federal courts are becoming more amenable to receiving opinion by the executive branch. *See First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche,* 210 F.2d 375 (2d Cir. 1954). Although these are act of state doctrine cases, not political questions, it is nonetheless clear that whether the state department believes that judicial action would interfere with its foreign relations is germane to whether a court may decide actions involving foreign relations.

are bound by no law; they are like our ancestors before the recognition or imposition of the social contract. A prerequisite of law is a recognized superior authority whether delegated from below or imposed from above—where there is no recognized authority, there is no law. Because no law exists binding these sovereigns and allocating rights and liabilities, no method exists to *judicially* resolve their disagreements. The ownership of the island, and derivatively its waters, has long been the subject of dispute. Were we to resolve this dispute we would not only usurp the executive power, but also intrude the judicial power beyond its philosophical limits.

The international law of territorial waters and of the continental shelf would also be involved in determining Occidental's right to oil from the concession area. Although some standards have been developed for the delineation of territorial waters, these formulations leave unresolved the permissible seaward extent of territorial waters. *See* 4 Whiteman, Digest of International Law 94-137 (1965). Therefore, we would be in a judicial no-man's land were we to purport to decide the legality of Sharjah's unilateral extension of its territorial waters or Iran's twelve-mile limit. Moreover, the ownership of the concession area would depend upon the ownership of the continental shelf between Abu Musa and Umm.[15] Again, although some standards have been developed, these standards depend in part on the existence of agreement among

[15] According to Article I of the Convention on the Continental Shelf, the continental shelf begins at the termination of the territorial waters and extends "to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admit of the exploitation of natural resources . . . ." Thus, rights to the continental shelf of Abu Musa depend both upon the extension of territorial waters by Sharjah and the sovereignty over Abu Musa itself.

sovereigns. Because ownership of the continental shelf is derivative of the ownership of the unsubmerged land, the extent and ownership of Abu Musa's shelf is necessarily in dispute. No manageable law exists to resolve disputed continental shelf ownership, however. *See* Article VI, Convention on the Continental Shelf, 15 U.S.T. The nexus between the absence of manageable standards and the political question is quite evident. Resolution of disputed continental shelf can only occur by the political action of the sovereigns themselves.[16]

On cross-appeal, we are asked to review the decision of the district court refusing to grant cross-appellant's motion for an injunction against all pending and further litigation, both in state and federal courts. The result of the immediate imposition of this injunction would serve to deprive the appellant of its statutory remedy of seizing further shipments of oil. On the other hand, appellees have a right to a speedy determination of this issue to avoid endless seizures that may amount to a major nuisance if this action is not finally determined on appeal.[17] We there-

[16] The response to the appellant's plea for a day in court can be interpolated from *Ware* v. *Hylton, supra*. The Supreme Court suggested that anyone dismissed from the judicial remedy because of executive prerogative should, of course, seek recourse through the intervention of the executive. Because the president holds plenary power in foreign relations, however, the president is free to refuse. Should the president ever officially act on a political issue, we would be constitutionally bound to accept his act. Moreover, there is no law against executive advisory opinions. As an alternative, the executive could create administrative courts to handle all political cases, review to the Supreme Court limited to the existence of a political question.

[17] As of May 9, 1975, there were 58 suits pending involving the same set of facts; 23 in the Western District of Louisiana, 12 in the Eastern District, 3 in the Eastern District of Texas, 2 in the Virgin Islands, 17 in the Louisiana State Court, Calcaieu Parish, and one in Texas State Court, Jefferson County. At the time of appeal, approximately 120 such suits were pending.

fore grant the injunction in order to protect the appellee, and stay the injunction pending disposition by the Supreme Court, in order to protect the appellant and promote a speedy resolution of this problem.[18] Should the appellant fail to appeal this judgment, the stay shall expire with the time limit for filing the appeal.

DISMISSED in part, REVERSED in part.

[18] Although federal courts are normally precluded from enjoining state litigation, an injunction is proper "where necessary in aid of its jurisdiction or to protect or effectuate its judgments." 28 U.S.C.A. § 2283. Because we have held that, as a matter of federal law, a political question emerges we deem it necessary to enjoin state proceedings in order to effectuate our judgment that the issue is one committed to the executive. Such an injunction also is necessary to aid the jurisdiction of the Supreme Court to finally resolve the question of the existence of a political question.

APPENDIX B

Opinion of the District Court

OCCIDENTAL OF UMM AL QAYWAYN, INC.

—v.—

CITIES SERVICE OIL CO., et al.,
("Lykavitos").

OCCIDENTAL OF UMM AL QAYWAYN, INC.

—v.—

KERR-MCGEE CORPORATION
("Anglo-Maersk").

OCCIDENTAL OF UMM AL QAYWAYN, INC.

—v.—

A CERTAIN CARGO LADEN ABOARD DAUNTLESS COLOCOTRONIS.
Civ. A. Nos. 74-1192, 75-0033 and 74-868.

United States District Court,

W. D. Louisiana

Lake Charles Division.

July 8, 1975.

EDWIN F. HUNTER, JR., *Chief Judge:*

Plaintiff seeks to recover crude oil seized on board three tankers. The oil was extracted from the seabed of the Arabian Gulf at a point located nine miles off the coast of the Island of Abu Musa.

These consolidated cases represent only a small portion of the pending litigation arising out of the same set of facts. As of May 9, 1975, there were approximately 58 separate actions: 23 in the Western District of Louisiana, 12 in the Eastern District of Louisiana, 3 in the Eastern District of Texas, 2 in the Virgin Islands, 17 in the Calcasieu Parish, Louisiana State Court, and one in the Jefferson County, Texas State Court.

Buttes Gas & Oil Company and Occidental are holders of offshore oil concession agreements granted by two adjacent sheikdoms. Sharjah and Iran refused to recognize Occidental's concession and instead recognized the concession of Buttes, thus enabling Buttes to commence drilling operations and produce the oil. This action, plaintiff argues, is tantamount to a confiscation, and the Hickenlooper Amendment requires that we adjudicate the controversy.

Defendants originally filed a motion to dismiss, which motion, by the interaction of F.R.Civ.P. 12 and 56, has now been converted into a motion for summary judgment. Numerous authenticated documents and affidavits appear in the record.

Due to the many contradictory factual assertions, it is appropriate to synopsize the uncontested facts and to set out the most important of those contested. In 1970 plaintiff filed a federal cause of action under the Sherman Act and claimed a deprivation of the enjoyment of the

precise gas concession here involved. Buttes Gas & Oil Company, the major defendant in that suit, moved to dismiss. The motion was granted in a thorough and well-reasoned opinion on March 17, 1971. The decision was pegged on the basic proposition that the Act of State doctrine precluded further adjudication and that the exception to the doctrine contained in the Sabbatino Amendment (Hickenlooper) was by its terms extremely narrow and not applicable to the situation presented. *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92, (C.D. Cal. 1971). The Court of Appeals for the Ninth Circuit affirmed at 461 F.2d 1261 (1972). The United States Supreme Court denied a writ of certiorari, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).

There are two Trucial States, Sharjah and Umm Al Qaywayn, located on the southeastern end of the Persian Gulf. Forty nautical miles into the Gulf is an island named Abu Musa. At the northern end of the Gulf, approximately 50 nautical miles from Abu Musa, is the country of Iran.

In 1964 the Rulers of Umm and Sharjah allegedly entered into a treaty agreement establishing a seabed border agreement, pursuant to which the limit of the territorial waters of Abu Musa was three (3) nautical miles and the area beyond this three-mile limit was Umm Al Qaywayn's continental shelf.[1] Sharjah, by an unpublished decree of September 10, 1969, extended its territorial waters to a

[1] This agreement is in the form of unilateral declarations made by the Rulers of Sharjah and Umm Al Qaywayn. They do not mention the Continental Shelf, but plaintiff is confident that after full discovery and a trial on the merits that the Court would conclude that these declarations established the boundary of the Continental Shelf of Umm at the three nautical mile limit off the territorial waters of Abu Musa.

point 12 nautical miles off Abu Musa, a decree assertedly contrary to the 1964 treaty.[2]

On November 18, 1969, plaintiff obtained from the Ruler of Umm a concession granting it the exclusive right to explore for and extract oil underlying the territorial and offshore waters of Umm. Subsequent to plaintiff's obtention of its concession from Umm, Buttes was granted an oil and gas concession by Sharjah on December 29, 1969, encompassing the territorial waters of Sharjah, its islands, including Abu Musa, and the seabed and subsoil lying beneath those waters. Each concession agreement was approved by the British government. On April 7, 1970, Sharjah and Buttes executed an amendment to the original concession extending the concession area to 12 miles off Abu Musa's coast. Plaintiff asserts that although the British Foreign Office was not "taken in" by the backdated decree and concession amendment, it endeavored to settle amicably the respective Territorial Waters claims of Umm and Sharjah by requiring both plaintiff and Buttes to cease any drilling operations and to submit their demands to mediation.

In the meantime, Iran, acting through the National Iranian Oil Company, set forth its claim to Abu Musa, and enunciated a 12-mile Territorial Waters jurisdiction. Great Britain left the Persian Gulf on or about December 1, 1971. Immediately prior thereto Sharjah and Iran settled their dispute pursuant to an agreement which called for the joint possession of Abu Musa and the disputed area. The agreement reserved the title question to

[2] Plaintiff asserts, in effect, that this was a backdated fraudulent Territorial Waters Decree and should not be considered by the Court. The record does not contain a copy of the decree, but it has been alleged affirmatively in the plaintiff's petition (Complaint, paragraph 8).

the future. It called for a 50-50 split in any oil royalties. Iran also recognized the validity of the Sharjah lease concession agreement to Buttes. In April of 1972, Buttes commenced drilling operations in the disputed area (nine miles east of Abu Musa) and later entered into joint venture agreements with the other defendants and/or their subsidiaries. In June of 1973, before the oil in question was extracted from the disputed area, Umm—the source of Occidental's concession rights—terminated that concession agreement, allegedly because of Occidental's failure to pay monies required under the agreement. Under the auspices of Sharjah and Iran, Buttes began extracting oil from the contested area, storing it temporarily on the "Baraka 1" and then shipping it to the United States. In September of 1974 this oil began arriving in the United States.

Defendants argue that dismissal and/or summary judgment should be required on five independent grounds:

A. Application of res judicata doctrine;

B. Application of collateral estoppel doctrine;

C. The Act of States Doctrine precludes inquiry into the acts of foreign states called into question;

D. Resolution of the issues would require adjudication of a boundary dispute between foreign nations;

E. The absence of Sharjah, Iran and Umm Al Qaywayn, which are indispensable parties.

Plaintiff's Basic Position

Occidental strenuously insists that defendants are complicating the simple, and that we must look through "these eristic maneuvers." In oral argument counsel stated:

"As surprising as it may sound, after the volume of briefs that have been filed, this is, in essence, a one issue law suit. The issue is: 'was Umm al Qaywayn a sovereign on November 18, 1969 when the concession was granted?'"

This presents an issue of fact that will require the Court's determination (Tr. 58-63). Put another way:

"Occidental's position is that the court must merely determine that Umm al Qaywayn was sovereign over the plaintiff's entire concession on November 18, 1969. If the plaintiff's concession was valid and in force in November, 1969, it remained valid and in force in November, 1971. Intervening territorial claims, however asserted, could not effect the plaintiff's vested property right in its concession, because not even an actual change in sovereignty alters vested property rights."[1]

Based on these arguments, plaintiff asserts that defendants

"cannot obtain summary judgment on the basis of assertions made in brief, however frantic, nor on the basis of selected readings, whether in farsi, urdu, swahili, or for that matter, english."

[1] *United States* v. *Rice*, 17 U.S. (4 Wheat.) 246, 4 L.Ed. 562 (1819); *Cobb* v. *United States*, 191 F.2d 604 (9th Cir. 1951), cert. denied, 342 U.S. 913, 72 S.Ct. 360, 96 L.Ed. 683 (1952).

RES JUDICATA AND COLLATERAL ESTOPPEL AS A RESULT OF OCCIDENTAL PETROLEUM CORPORATION VS. BUTTES GAS & OIL COMPANY, 331 F.Supp. 92 (C.D. California, 1971), AFFIRMED AT 461 F.2d 1261 (9 Cir., 1972), WRITS DENIED 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed. 2d 221.

The prior action and the instant one assert the same right: an alleged exclusive right to explore and develop the petroleum resources of the disputed area in the Persian Gulf. The wrong asserted is basically the same—that is, the interference and deprivation of its lease concession rights in that area. But the cause of action is different and at least one new event transpired after the California decision became final—the delivery of the oil in the United States.

Res judicata requires two suits involving the same cause of action. *Lawlor* v. *National Screen Service Corporation* 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corporation,* 421 F.2d 1313, 1316 (5th Cir. 1970). Comparison of the complaint in the instant case with the one in California demonstrates that the causes of action are not the same. In California, Occidental alleged a violation of antitrust laws based on various activities of Buttes and others, including an *attempted* confiscation of its oil concession. The present complaint asserts the right to recover oil within the control of the Court, and a claim traced through an alleged confiscation of a concession agreement. Despite the almost identical factual background, the two causes of action are different.

The motion to dismiss on the basis of res judicata must be denied. It is.

Collateral estoppel forecloses relitigation of all issues litigated in a prior proceeding. It is immaterial that two

actions are different, tried on different grounds, or instituted for different purposes and seek different relief. *Parker* v. *McKeithen*, 488 F.2d 553 (1974). But a legal finding may be successfully utilized as collateral estoppel only when it is evident from the pleadings and the record that the finding was necessary to the final decree and was foreseeably of importance in possible future litigation. *Hyman* v. *Regenstein*, 258 F.2d 502-510 (5th Cir., 1958). Our duty is to examine the decision of the Court in the prior litigation and determine the precise perimeter of the judgment. The California court reached two very pertinent ultimate conclusions:

1. The claim alleged could not prevail without an inquiry into the authority for and motivation of the acts of foreign sovereigns, and the Act of State Doctrine precluded such an inquiry.

2. The portion of the complaint in issue did not fall within the ambit of the Hickenlooper Amendment, for the reason that the complaint refers to "an attempted confiscation," whereas the statute applies only to a "confiscation or other taking."

These two determinations were the only necessary and essential requisites to the dismissal. The present complaint alleges an actual confiscation, but it was surely foreseeable that the two other observations made by Judge Pregerson would be of importance in possible future litigation:

3. "The conduct of Sharjah did not amount to an effective confiscation; rather, plaintiffs were allegedly deprived of their concession only by the cooperative effect of a number of acts of state, of which Sharjah's claims were not the most efficacious. This is

not a situation at which the Sabbatino Amendment was aimed." 331 F.Supp. at 112.

4. "Regardless of the wording of the complaint, it would be conceptually and prudentially hazardous to treat the territorial waters claim of Sharjah as a 'confiscation' subject to adjudication under the international legal standards governing that kind of act. Claims to territory are a different matter from the expropriation of corporate property within or appertaining to that territory." (footnote 33, at page 112).

Armed with this language, defendants insist there should be no litigation encore. The passages contained in paragraphs "(3)" and "(4)" cannot be ignored, especially in view of the language used by the Ninth Circuit in the per curiam affirmation:

> "The dismissal was correct. We affirm for reasons stated in the district court's opinion." (461 F.2d 1261).

and by Judge Pregerson, below:

> "The pleading is insufficient to invoke the Sabbatino Amendment for several reasons." (underscoring ours).

The enigma—what "reasons stated in the district court's opinion" formed the basis for the affirmance? Our attempt to carve our way through this litigation has not given us the answer. Doubt must be resolved by denial. Accordingly, we *decline* to hold that the Doctrine of Collateral Estoppel by Judgment operates to prevent plaintiff from re-litigating the issue of applicability of the Hickenlooper Amendment.

Indispensable Parties

Defendants persist in arguing that Sharjah, Iran and Umm Al Qaywayn are indispensable parties. Arguably, an adjudication in plaintiff's behalf might greatly affect the territorial and financial interest of Sharjah, Iran and Umm. Be that as it may, the argument of indispensability and the decisions cited in support are not persuasive in this factual situation.

None of the absent sovereigns can be joined. As to Sharjah and Iran, the alleged confiscating sovereigns, a holding of indispensability would render illusory the very rights that the Hickenlooper Amendment seeks to preserve. Rule 19 of the Federal Rules of Civil Procedure will permit this action to proceed in absence of the sovereigns who cannot be joined. Rule 19(b) applies where joinder of a missing party is not feasible:

> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Federal Rules of Civil Procedure, Rule 19(b).

Rule 19 directs a pragmatic analysis, not one dictated by the application of formal categories. Note of the Advisory Committee on Civil Rules, 39 F.R.D. 69, 90-93 (1966); see *Kaplan, Continuing Work of the Civil Committee; 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 Harv.L.Rev. 356, 363, 367 (1967). The application and effect of Rule 19(b) are discussed in the opinion of the United States Supreme Court in the case of *Provident Tradesmen's Bank and Trust Company* v. *Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

We conclude that practical consideration of the rights and interest of the present parties to the suit and of those of the absentees require that the case proceed in this forum even though the absentees cannot be brought into the action.

The motion to dismiss pegged on the absence of indispensable parties is denied.

Boundary Dispute—Act of State Doctrine

In the California case, Judge Pregerson: "The determination of foreign states' boundaries is not a permissible function of this court," (331 F.Supp. at 103) but declined to dismiss because the antitrust allegations did not require a determination of foreign boundaries. Our appreciation of the law and the issues in the instant case require a different approach.

Throughout this litigation defendants have treated as an unassailable rule of law the premise that a United States Court cannot decide a case involving the private rights of private parties to property if the adjudication of those rights requires a collateral determination of any kind with respect to boundaries. We do not read the jurisprudence to be that all-embracing. We prefer a narrower

construction, and conclude that if the resolution of the boundary dispute requires inquiry into the authenticity and motivations of the acts of foreign states, then and in that case judicial resolution would be inappropriate. This issue reflects the unconventional nature of this litigation, which arises out of the claims and acts of a number of foreign states. The concerns aroused by the boundary aspects are intricately interwoven with the Act of State Doctrine. The two must be considered together, vis-a-vis the Hickenlooper Amendment.

ACT OF STATE DOCTRINE

To set the stage for a discussion of what the Court feels is the most substantial ground for defendants' motion, we take the liberty of quoting extensively from the district court's opinion in *Occidental Petroleum Corp.*, supra, at pp. 108-109:

> "In *Underhill* v. *Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), the Supreme Court first definitively held that 'the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.' This 'classic American statement of the act of state doctrine' was reaffirmed by the court most recently in *Banco Nacional de Cuba Sabbatino*, 376 U.S. 398, 416-418, 84 S.Ct. 923, 934, 11 L.Ed.2d 804 (1964). In the *Sabbatino* case, the bases of the doctrine were at last explicitly elaborated. The act of state doctrine, it was held, is not required by international law. 376 U.S. at 421-422, 84 S.Ct. 923. Nor is it compelled by notions of sovereign authority, although they 'do bear upon the wisdom of employing' it. *Id.* Finally, the doctrine is not required by the Constitution. 376 U.S. at 423-424, 84 S.Ct. 923.

> "The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the interrnational sphere."
>
> "In sum, the doctrine is a reflection of the executive's primary competency in foreign affairs, and an acknowledgment of the fact that in passing upon foreign governmental acts the judiciary may hinder or embarrass the conduct of our foreign relations. See 376 U.S. at 427-428, 431-433, 84 S.Ct. 923."

A more descriptive justification of the doctrine is found in *Frazier* v. *Foreign Bondholders Protective Council*, 283 App.Div. 44, 125 N.Y.S.2d 900, 903 (1953):

> "It is a doctrine born of expediency, nourished in the council halls of nations as well as the courts of justice. Its dominant motif is political. It has gained stature in the world of international diplomacy and politics, where an 'incident' involving the dignity of nations is measured by its explosive potential as well as its legal implications."

When foreign governments perform an act of state which changes the relationship of the parties touching the "res,"

and this change results in an accomplished fact (as here), then it would be an affront to such a foreign government for courts of the United States to hold that such act was a nullity. The entire fabric of the complaint is woven out of attacks on the validity of, or questioning the reasons for, the acts of Sharjah, Iran and Umm, with respect to the precise rights which plaintiff asserts. It traces a series of wrongs of foreign states to reveal why the lease agreement cancellation by Umm was invalid and why neither Sharjah nor Iran had a right to honor the lease contract (concession) by Buttes and its joint venturers; or to put it another way, to explain why the failure to honor Occidental's concession agreement constituted a confiscation. Nothing in *Rice* (supra) and *Cobb* (supra) will relieve this court from a forbidden inquiry into acts of state unless, of course, it is the Hickenlooper Amendment.

A listing of numerous acts of state appear in plaintiff's petition:

(1) Plaintiff claims title and right to the oil on the ground that Umm Al Qaywayn validly granted it an exclusive right to explore and exploit the disputed area, and never validly terminated that right. Umm Al Qaywayn's notice of termination was invalid, and attempts to explain the invalidity on the ground that Umm Al Qaywayn's sovereignty over the area was suspended, in fact, "as a result of actions of Sharjah and Iran * * *."

(2) Sharjah "allegedly issued" an unpublished decree dated September 10, 1969—a decree assertedly contrary to treaty obligations with the British Government—"purporting to extend" its territorial waters to twelve nautical miles.

(3) Sharjah granted Buttes an oil concession on December 29, 1969.

(4) The concession was amended on April 7, 1970, "so as to extend" the concession area from three to twelve miles off the coast of Abu Musa, and this was done in furtherance of the purposes of the Ruler of Sharjah to enlarge the concession area granted by him on December 29, 1969, to Buttes, so as to include the structure in the disputed area, and "thus to enable the Ruler of Sharjah to share with Buttes the substantial revenues to be derived from the underwater structure."

(5) Sharjah, in May of 1970, rejected a suggestion of the British Foreign Office that Occidental be allowed to operate within the disputed area pending arbitration.

(6) Sharjah, in May of 1970, requested the British Foreign Office to prohibit all operations in the area pending determination of the dispute by arbitration.

(7) In May of 1970 Iran made a claim to Abu Musa which was "without foundation and contrary to historical fact * * *."

(8) In July of 1970 Sharjah consented to the British Government's appointment of a mediator.

(9) Sharjah rejected the mediator's proposals, which were made on or about September 28, 1970.

(10) In November, 1971, Sharjah and Iran "confected" a "Memorandum of Understanding" relating to Abu Musa, allegedly in disregard of Occidental's vested rights to operate in the concession area. The Memorandum of Understanding provided that neither Iran nor Sharjah would recognize the other's claim of sovereignty over Abu Musa; that Iranian troops would arrive and occupy part of the island; that both Sharjah and Iran would recognize the breadth of Abu Musa's territorial sea as twelve nautical

miles; that exploitation of the petroleum resources of the seabed and subsoil beneath the territorial sea would be conducted by Buttes; and that half the governmental oil revenues would be paid directly to Iran and the other half to Sharjah.

Hickenlooper

No doubt disturbed by the deteriorating conditions between the United States and Cuba and by the Supreme Court decision in *Sabbatino,* Congress, on October 2, 1964, quickly passed the Hickenlooper Amendment to the Foreign Assistance Act of 1964, the avowed purpose of which was to "reverse in part the recent decision of the Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino*" (U. S. Senate Foreign Relations Committee, July 10, 1964). The statute provides:

> "Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law • • •; *Provided,* That this subparagraph shall not be applicable • • • (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

This so-called exception to the acts of state doctrine encountered strenuous opposition from the executive branch during its passage through Congress.[4] In a similar vein, the Amendment has been very stringently applied and strictly construed. This limited exception controls only when (a) a claim of title or other right to property is asserted[5](b) based upon a confiscation or other taking (c) in violation of international law.

The issue quickly narrows: Are defendants precluded from invoking the act of state doctrine by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S. C.A. 2370(e)(2)? We believe the answer must be in the negative.

First: Giving full consideration to the asserted new events,[6] we agree with Judge Pregerson's observation that "it would be conceptually and prudentially hazardous to treat the territorial waters claim of Sharjah as a 'confiscation' under the legal standards governing that kind of

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[4] For an extensive review of the amendment's pertinent legislative history see *Banco Nacional de Cuba* v. *First National City Bank of N.Y.*, 431 F.2d 394 (2nd Cir., 1970) at pp. 400-402.

[5] For the Sabbatino Amendment to be applicable, circumstances must precisely fit the statutory language. In *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 444, 242 N.E. 2d 704, 712 (1968) the Chief Judge declared that

> "[it was] abundantly clear • • • that Congress was not attempting to assure a remedy in American courts for every kind of monetary loss resulting from actions, even unjust actions, of foreign governments. The law is restricted, manifestly, to the kind of problem exemplified by the *Sabbatino* case itself a claim of title or other right to *specific property* which had been expropriated abroad." (Emphasis added).

[6] The Sharjah-Iran annexation, followed by non-recognition of Occidental's concession and the importation of oil into the United States.

act." We find nothing in the wording of the statute or in its legislative history which would give plausibility to Occidental's major premise that the conduct of Sharjah and/or Iran amounted to a "confiscation." We cannot ascribe to the belief that a confiscation of plaintiff's concession agreement occurred when Sharjah and Iran allegedly extended their territorial waters claim to include the disputed area. Territorial waters claims are subject to a body of international law, wholly different from that related to confiscations. See e. g. *McDougal and Burke, The Public Order of Oceans,* 486-98, 520-61; see also *Major Middle Eastern Problems in International Law, American Enterprise Institute for Public Policy Research* (1972). We hold that the conduct set forth in the complaint did not amount to a confiscation within the meaning of the Hickenlooper Amendment. Contrariwise, the record reveals that plaintiffs were allegedly deprived of the enjoyment of their concession only by the cooperative effect of a number of acts of state by Sharjah, Iran and Umm Al Qaywayn. This is not a situation at which the Sabbatino Amendment was aimed. *Occidental Petroleum Corp.* v. *Buttes Gas & Oil,* supra. On its face a claim to submerged lands and their superadjacent waters coincidental with a lease for the exploration of mineral resources could not conceivably have been envisioned by Congress to rise to the magnitude of a confiscation within the narrow confines of the Hickenlooper Amendment.

SECONDLY: The United States Court of Appeals for the Second Circuit has on at least two occasions made an exhaustive analysis of the Amendment's legislative history and concluded that its effect is limited to cases involving claims of title with respect to American owned property nationalized by a foreign government, and that the amend-

ment was inapplicable to contract claims. *Menendez* v. *Saks & Co.,* 485 F.2d 1355 at 1372 (1973) cert. granted on other grounds, 416 U.S. 981, 94 S.Ct. 2382, 40 L.Ed.2d 758; *Banco Nacional de Cuba,* 431 F.2d 394 (1970).[7] Further support for this interpretation of the Hickenlooper Amendment is found in *French* v. *Banco Nacional de Cuba,* 23 N.Y.2d 46, 295 N.Y.2d 433, 242 N.E.2d 704 (1968), where the New York Court of Appeals held that a claim for breach of contract is not a " 'claim of title or other right to property' within the meaning of the Hickenlooper Amendment," and that the repudiation of a contractual obligation does not amount to a "confiscation or other taking," as those terms are used in the statute.[8]

Applying these principles to the instant case, what was allegedly confiscated? It was not the oil which was extracted from the disputed area by Buttes in 1974. It was not an oil well or an oil mine. The well from which the oil was extracted was owned by Buttes and developed and drilled by them, pursuant to their concession agreement with Sharjah. The property allegedly confiscated was the Occidental concession. It was not the confiscation of an oil well. The "concession agreement" was nothing more than a lease contract under which the lessee agreed to pay certain considerations to the lessor for the privilege of exploring, drilling for, and extracting oil. A true and correct Xerox copy of the agreement has been filed by plaintiff as its Exhibit "1."

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[7] Upon its review of the Banco case, the Supreme Court did not disturb the conclusion reached by the Second Circuit that the Hickenlooper Amendment was inapplicable. See *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 at 780, note 5, 92 S.Ct. 1808, 32 L.Ed.2d 466.

[8] See also 12 A.L.R. Fed. at 815.

Simply stated, the concession agreement was a contractual right to explore for and extract oil from a given area. This agreement did not constitute "a claim of title or other right of property" within the meaning of the amendment. We so hold.[9]

THIRDLY: Plaintiff, in order to prevail on the merits, must prove its lease agreement was valid as of the date the oil was extracted. In June of 1973, before the oil in question was extracted from the disputed area, Umm Al Qaywayn, the source of plaintiff's concession agreement, terminated the agreement.[10] The act of state doctrine precludes inquiry into reasons for or the validity of the cancellation unless Hickenlooper is applicable.[11] We do not be-

[9] Significantly, defendants have not pressed the conclusions reached as to the confiscation and/or repudiation of contract rights. This would have been inconsistent with their insistence that we dismiss on the basis of "res judicata" and/or "collateral estoppel." We note, too, plaintiff's suggestion in footnote 3 of its reply memorandum that the legislative history set out in *Banco* (431 F.2d 394) indicates that the amendment is applicable to "oil concessions." We do not agree. The colloquy between Professor Olmstead and Congressman Frazier had to do with ore or oil from an expropriated mine or well.

[10] Article 26.1 of the Agreement:

> "The Ruler shall have the right to terminate this Agreement upon three (3) months prior written notice to Occidental:
>
> "(a) if Occidental has not fulfilled the obligations provided for in Article 4 hereof; or
>
> "(b) if Occidental shall be in default of an arbitration award under the arbitration provisions of this Agreement."

[11] Occidental's case is premised on the proposition that Umm was sovereign over the disputed area on November 18, 1969. The cancellation, they argue, is to be disregarded because Umm is no longer sovereign. But as we see it, the question of who was sovereign and when, are themselves inquiries into the reasons for and/or the validity of acts of state. It barely requires emphasis

lieve it applicable and so conclude. *Franch* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704.

FOURTHLY: "Hickenlooper" requires title to confiscated property and its proceeds to be determined as of the date of confiscation. The petition alleges this occurred in November of 1971. Concededly, in 1970 a boundary dispute existed between Iran, Sharjah and Umm. To decide whether or not there was a confiscation would require a determination of that boundary dispute. Who owned the disputed area as of November, 1971? Even as of today, Iran and Sharjah have deferred a determination of title as between them. Then, too, Umm's possible ownership is not being ignored (30% of Sharjah's share of what it collects from Buttes).

Summarizing: Practical considerations underlying a specific situation must be precisely examined to avoid conclusions making for eventual confusion and conflict. The instant case presents one of those problems for the rational solution of which it becomes necessary to take soundings. The case before us is this: Sharjah and Iran recognize the Buttes' concession. Umm cancelled the Occidental concession, but participates in the rentals received from Buttes. In light of this history and what we perceive to be the purpose of Hickenlooper, I just cannot bring myself to believe that Congress intended to permit United States Courts to tell these three foreign countries: "You are

that the Ruler of Sharjah pays the Ruler of Umm 30% of Sharjah's share of the total revenue accruing to it and payable by Buttes pursuant to its concession agreement with Sharjah and Iran (See affidavit of D. Paul Fitzgibbon, filed by plaintiff in these proceedings).

wrong and we are right as to the ownership of your offshore waters."

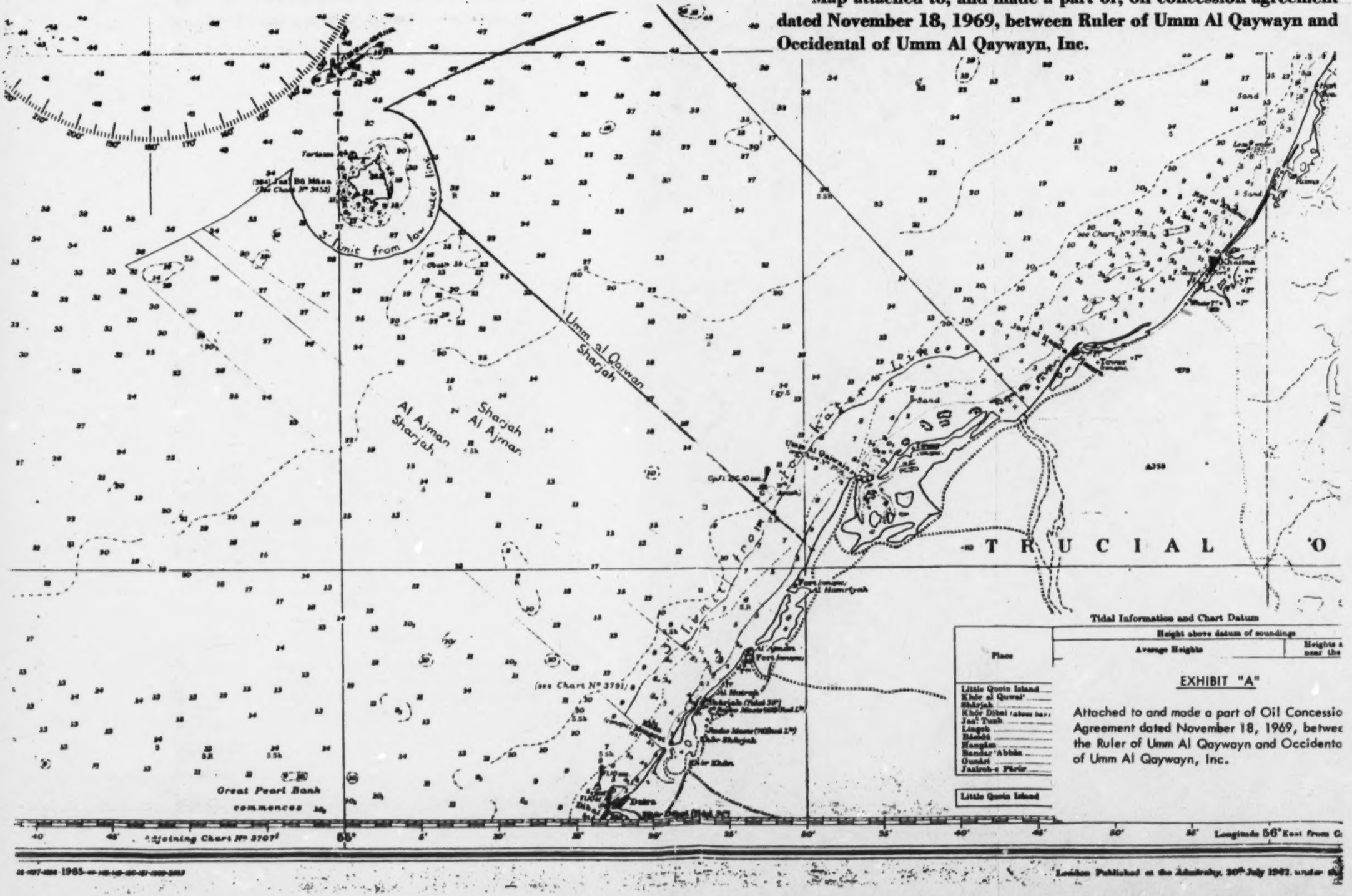
The motion for summary judgment should be granted in each case. So ordered.

DEFENDANTS' REQUEST FOR INJUNCTION TO ENJOIN ALL FURTHER LITIGATION BASED ON THE SUBJECT MATTER

The facts alleged in each of the 58 pending actions and the manner in which they are set forth are virtually identical. The factual distinction is that different ships and their cargoes are involved. There are no inherent obstacles preventing a district court from issuing orders which affect litigation in other courts, state or federal. This court has the discretionary power to issue a single injunction forbidding further proceedings in the pending cases awaiting the final outcome of this litigation. However, we feel it would be highly prejudicial to issue such an order. This is so because the order would deprive the plaintiff of its statutory remedy with respect to further shipments of oil by the defendants to the United States before a final determination of its claim. The request for injunctive relief to enjoin *all* further litigation is denied.

APPENDIX C

Map attached to, and made a part of, oil concession agreement dated November 18, 1969, between Ruler of Umm Al Qaywayn and Occidental of Umm Al Qaywayn, Inc.



APPENDIX D

Same map as Appendix "C" with clarifying notations, shadings, and identifications added by Petitioner for Court's convenience.